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LETTER DATED 10 FEBRUARY 1993 FROM THE PERMANENT REPRESENTATIVE OF FRANCE TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

Please find attached the report of the Committee of French Jurists set up by Mr. Roland Dumas, Minister of State and Minister for Foreign Affairs, to study the establishment of an International Criminal Tribunal to judge the crimes committed in the former Yugoslavia.

I should be grateful if you would have this report distributed as a document of the Security Council.

(Signed) Jean-Bernard MERIMEE

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## INTRODUCTION

1. An end was put to Hitler's atrocities by force of arms, not arguments. 1/ Despite the Allies' solemn declarations promising punishment for those responsible for atrocities, these actually increased up until the end of the Second World War, as if the prospect of punishment, far from restoring respect for the laws of humanity, prompted still greater excesses.

2. Breaches of the laws of war and of humanity are, alas, now taking place in the territory of the former Yugoslavia, but conditions have changed since the Second World War.

3. The Nürnberg and Tokyo Judgments showed that leaders who organize atrocities are no longer immune from the severest penalties.

4. The United Nations has a special role to play in the conflict by virtue of several resolutions.

5. A well-informed international public opinion expects effective action to be taken to put an end to the present situation.

6. In addition to such conventional means as the use of armed force or negotiations to put an end to an unacceptable situation, the use of judicial means while the conflict is still going on, rather than after it has ended, can, through the speedy prosecution of those responsible for atrocities, help put an end to such excesses or at least discourage some subordinates from collaborating therein. Such an approach is also comforting for the victims, in that they can be sure that everything possible will be done to punish the guilty. Lastly, this approach, if successful, could lead to the establishment of a permanent international court with the authority to intervene swiftly in new conflicts.

7. It was with these considerations in mind that the Committee of Jurists established on 15 January 1992 2/ by Mr. Roland Dumas, Minister of State and Minister for Foreign Affairs, sought to fulfil its mandate.

8. This mandate was established in the letter which Mr. Dumas sent on 16 January to Mr. Pierre Truche, Procurator-General of the Court of Cassation and Chairman of the Committee, 3/ in which he expressed the hope that the Committee would be able, on the basis of existing studies and work, to

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1/ Pierre Legendre, Le Crime du caporal Lortie, Fayard, 1989.

2/ The composition of the Committee is indicated in annex I.

3/ The full text of the letter from the Minister to the Chairman of the Committee is reproduced in annex II.

consider precisely and speedily the various issues raised by the establishment of an International Criminal Tribunal that would be competent to judge the war crimes, crimes against humanity or serious violations of certain international conventions being committed in the territory of the former Yugoslavia, and would submit to him a proposal concerning its possible Statute.

9. The Minister added that the Committee would be able to make all the proposals it deemed appropriate with regard to the procedure to be followed in establishing the Tribunal and all other points that might be relevant to the end for which the Committee had been established. For the purpose of performing its mission, the Committee could, should it deem necessary, proceed to hear competent individuals.

10. The Committee held five meetings between 18 January and 6 February 1993 at the Ministry of Foreign Affairs, 4/ and was assisted in its work by several members of the staff of the Department's Division of Legal Affairs. Professor Alain Pellet acted as Rapporteur.

11. After making a selective inventory of the copious documentation that exists on the subject of the establishment of an international criminal court, 5/ members of the Committee drew up a list of the problems raised by the creation of an International Tribunal and shared out the issues to be studied, each of them drafting a note on the issues most closely related to his or her sphere of competence.

12. These notes and the report drafted by the Rapporteur were discussed by the full Committee. The Committee's conclusions were adopted unanimously.

13. Because it had only a very short time in which to complete its work, the Committee was unable to hold formal hearings with competent individuals. However, it was kept informed of deliberations taking place in other countries, or in some international bodies, concerning the establishment of an International Criminal Tribunal to judge the crimes committed in the former Yugoslavia, or of a permanent international criminal court. Some members of the Committee also contacted competent French or foreign individuals and reported on these contacts to the full Committee.

14. Although the Committee tried to make as thorough a study as possible, time constraints prevented it from going into all the details that it probably should have considered on some points. The study which follows is therefore necessarily brief.

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4/ On 18, 21 and 27 January and 1 and 6 February 1993.

5/ The list of the proposals for the establishment of an international criminal court of which the Committee was seized is reproduced in annex III.

15. In particular, the Committee felt that it should not include in its report a comprehensive, definitive proposal for the possible Statute of the Tribunal. For purposes of illustration, however, annex V gives an idea of the provisions which such a Statute could comprise, while annex IV outlines in more general terms the principles which the Committee believes could guide the establishment of an International Criminal Tribunal to judge the crimes committed in the territory of the former Yugoslavia.

16. For the same reasons, in some cases the Committee chose to emphasize that several possibilities exist and that choosing between them will depend on further study or on considerations of political expediency which do not fall within its mandate.

17. Having made these general remarks, the report is divided into five parts dealing with:

- The nature of the Tribunal and the procedure that could be followed in establishing it (Part I);
- The competence of the Tribunal (Part II);
- Prosecutions and proceedings (Part III);
- Sentencing and penalties (Part IV); and
- Institutional aspects (Part V).

18. To avoid making the Committee's report unduly cumbersome, five documents are annexed to it:

Annex I: Composition of the Committee

Annex II: Mandate of the Committee (letter dated 16 January 1993 from Mr. Roland Dumas, Minister of State and Minister for Foreign Affairs, to Mr. Pierre Truche, Procurator-General of the Court of Cassation and Chairman of the Committee)

Annex III: Basic documentation used by the Committee

Annex IV: Principal recommendations of the Committee - applicable principles

Annex V: Possible provisions for the Statute of the Tribunal.

# I. THE NATURE OF THE TRIBUNAL AND THE PROCEDURE THAT COULD BE FOLLOWED IN ESTABLISHING IT

## A. Legitimacy of establishing a Tribunal

19. As the Minister of State indicates in his letter of 16 January 1993 to the Chairman of the Committee, "Unfortunately, there is no longer any doubt that particularly serious crimes are being committed in the territory of the former Yugoslavia that constitute war crimes, crimes against humanity or serious violations of certain international conventions.

> "Such actions cannot go unpunished, and the absence of real penalties, in addition to being an affront to public conscience, could encourage the perpetrators of these crimes to pursue their regrettable course of action".

20. The Committee agrees entirely with this assessment and has no doubt as to the advisability of proceeding swiftly to the establishment of an International Criminal Tribunal that would be competent to judge these crimes committed in the former Yugoslavia.

21. The legitimacy of creating such a Tribunal would seem to be all the more clearly established in that it would not be open to two charges sometimes levelled at the Nürnberg and Tokyo International Military Tribunals:

(a) While, at the time, there may have been doubts about due respect for the principle whereby a crime is not punishable unless it has a priori been defined by law (nullum crimen sin lege), this is no longer true today: punishment of the crimes and atrocities committed by the Nazis was required by the "dictates of the public conscience" 6/ but was justified legally only by the general principles of law recognized by all nations. Nowadays, such punishment is also justified by indisputable norms of international customary law, thanks to the development of international law that has since taken place as a result of both domestic and international case-law, treaty practice and United Nations resolutions;

(b) Furthermore, while the Tribunals established at the end of the War could have been accused of dispensing the justice of those who won the War, such a criticism could in no circumstances be levelled at the Tribunal whose establishment is now envisaged; quite the contrary, since the internationalization of the prosecutions and the judgement would, for both the victims and the accused, be a guarantee of impartial justice rendered without any intervention of the parties concerned.

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6/ To use the wording of article 158 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; see also article 63 of the first Convention, article 62 of the second Convention and article 142 of the third Convention.

B. "Profile" of the Tribunal - an ad hoc court

22. In the Committee's view, the above general considerations would seem to dictate the "profile" of the proposed Tribunal.

23. Such a Tribunal:

(a) Must be international, both in its manner of establishment, its composition and its powers;

(b) Must be universal, because the crimes it is to punish are an affront to the conscience of all humanity;

(c) Must offer the utmost guarantees of impartiality in respecting the rights of the defence and due consideration for the victims;

(d) Should not become another international bureaucracy divorced from reality, as this would deprive it of any deterrent effect.

24. To this end, as the letter dated 16 January 1993 from the Minister of State indicates, it is essential to proceed swiftly to the establishment of the Tribunal.

25. This latter requirement, in and of itself, demands that we lean towards the creation not of a permanent international criminal court, to which the Tribunal could none the less be the prelude, but of an ad hoc Tribunal whose powers would be clearly delimited. Experience has shown that the creation of a permanent international court with general and diversified powers, while not impossible, would encounter numerous obstacles, and it seems unrealistic to believe that such a court could be established within the necessary time-frame. 7/

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7/ See, however, resolution 47/33 adopted by the General Assembly on 25 November 1992, which gives the International Law Commission a mandate to "continue its work". Without wishing to question the determination of Member States successfully to complete that work, we should however recall the adoption by the General Assembly on 12 September 1950 of resolution 489 (V) setting up a Committee responsible for preparing "proposals relating to the establishment and the statute of an international criminal court". Draft statutes submitted in 1951 and 1953 went nowhere and consideration of the 1953 draft was suspended in 1957. It was only in 1990 that the General Assembly requested the International Law Commission to resume consideration of the question.

C. Drawbacks of the treaty approach

26. The Committee discussed the procedures for establishing the Tribunal and, therefore, the nature of the legal document which could bring it into being and the procedure whereby such a document could be prepared and then adopted.

27. Establishing the Tribunal through the conclusion of an international treaty among States is one of the approaches which automatically come to mind for several reasons: first of all, this was the course followed in the case of the main precedent which we can really invoke, the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis, which established the Nürnberg Tribunal. 8/ Secondly, the establishment of a court affects the sovereignty of States very closely. In this connection, we might note that in all the discussions that have taken place within the United Nations, particularly over the past two years, on the establishment of a universal international criminal court, the conclusion of a treaty has been viewed as the normal approach.

28. It is clear, however, that the establishment of an ad hoc Criminal Tribunal by means of a treaty among States would encounter difficulties so serious that they can probably be considered diriment.

(a) The idea of using a treaty first raises the issue of which States could or should sign and ratify the treaty in question. Quite apart from the fact that it is totally unrealistic to assume that the Tribunal would be established following ratification of the treaty by the entire membership of the United Nations, the question of signatory States also raises a philosophical and legal issue, namely, who, and in the name of what principle, can be given or can take upon himself the power to establish a Tribunal responsible for trying crimes, however odious, committed in certain countries, several of which would in all likelihood refuse to sign and ratify the treaty in question.

(b) No matter how many States were given the right to establish an International Criminal Tribunal and no matter what their geographical location, it would be unrealistic to expect all of them to ratify the agreement that we assume would be concluded. The number of States whose agreement was indispensable or, to put it technically, the number of States that would have to ratify the treaty in order for it to enter into force, would therefore have to be determined.

(c) Lastly, the international negotiations and the diplomatic conference that would be required in order for an agreement to be reached that could be opened for signature by States with any real chances of success could be expected to take a long time, and the time required for its ratification would further delay its entry into force.

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8/ By contrast, the Charter of the International Military Tribunal for the Far East was "approved" on 19 January 1946 by the Supreme Allied Commander.

D. Lack of competence of the United Nations to establish, by binding decision, a permanent universal criminal court

29. The approach of concluding an agreement among States thus appears to be fraught with difficulties of principle and technical hurdles. However, another solution, that of the United Nations, is conceivable.

30. By virtue of the Charter, 9/ the United Nations clearly has competence in the field of human rights and protection of the fundamental rights of the human person.

31. Moreover, this would not be the first time - far from it - that the question of an international criminal court was studied within the United Nations. Although the proposals so far considered have not gone anywhere, 10/ they at least establish, if need be, the legitimacy of United Nations intervention in this field.

32. Some passages of the London Agreement establishing the Nürnberg Tribunal also reflect this legitimacy: the Agreement affirms that the "Four" were acting "in the interest of all the United Nations". 11/

33. If it was a matter of establishing a jurisdiction with universal competence, however, the Committee would be very reluctant to consider the United Nations as being competent to establish an international criminal court with binding force. There are no provisions in the Charter that could be invoked as giving the Security Council or the General Assembly such powers.

E. Competence of the Security Council to establish an ad hoc Criminal Tribunal under Chapter VII of the Charter

34. The nature of the problem changes, however, when what is to be established is not a universal international criminal court, but rather an ad hoc Tribunal designed specifically to punish the perpetrators of abominable crimes committed in an ongoing conflict. In line with the trend towards interpreting the Charter dynamically and teleologically, the Committee believes that the Security Council could, if necessary, establish such a Tribunal by virtue of the powers conferred on it by Chapter VII of the Charter "with respect to threats to the peace, breaches of the peace, and acts of aggression".

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9/ Cf. Articles 1 (3), 13 (1) (b), 55 (c) or 62 (2).

10/ See footnote 7 above.

11/ Fourth preambular paragraph.

35. By virtue of these provisions, should the Security Council determine the existence of a threat to the peace or a breach of the peace, it has the power to decide what measures shall be taken to maintain or restore international peace and security.

36. Now, one of the justifications most frequently advanced for the establishment of an ad hoc Tribunal is the fact that, setting aside any moral considerations, establishing such a Tribunal would put an end to the de facto impunity which the authors of the crimes taking place in the former Yugoslavia believe they enjoy. No doubt the former Yugoslavia and the States that have replaced it were, or still are theoretically bound by such fundamental international instruments as the Convention on the Prevention and Punishment of the Crime of Genocide or the Geneva Conventions of 1949. No doubt even these States, in theory, have the necessary means, under their domestic law to punish such crimes judicially. However, the current state of the institutions of some of the countries concerned and the situation of all-out or avowed war prevailing in their territories rules out any possibility of effective prosecution. The establishment of a credible international court, even if it were to prosecute and punish only a limited number of those guilty of crimes, can therefore be considered likely to help restore the peace and security of those countries and, hence, international peace and security.

37. Moreover, the Security Council has already embarked on such a course, albeit cautiously. Invoking Chapter VII, it has demanded "that all parties and others concerned in the former Yugoslavia ... immediately cease and desist from all breaches of international humanitarian law ... including those involved in the practice of 'ethnic cleansing'" and has requested States, international humanitarian organizations and the Secretary-General to collate substantiated information on such violations. 12/ It has also requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse such information. 13/ There would seem to be little point in collating such information if the Security Council cannot act on the findings of these investigations.

## F. Scope of Article 41 of the Charter

38. It may well be asked, however, whether the establishment of a Tribunal, owing to its very special nature, is among the measures which the Security Council has the power to take under Chapter VII.

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12/ Resolution 771 (1992) of 13 August 1992.

13/ Resolution 780 (1992) of 6 October 1992. Pursuant to this resolution, the Secretary-General has established a five-member Commission (see document S/24657).

39. In that connection, Article 39 refers back to Articles 41 and 42. 14/ The first-mentioned of these provisions lists certain measures which the Members of the United Nations may be called upon to implement other than measures involving the use of armed force (which come under Article 42). The measures referred to in Article 41, which are primarily economic in nature, 15/ may appear to be very far from the establishment of a Tribunal. However, this list is merely illustrative and should not be interpreted as ruling out other measures should they prove necessary. The criterion for a contemporary interpretation of Article 41 is commensurability to the objective that is sought. From this perspective, the establishment of a Tribunal would be an appropriate measure if, in the circumstances obtaining at the time, it seems likely to attain or facilitate the objective of restoring international peace and security.

40. While this reasoning holds up if the decision to establish the Tribunal is taken while hostilities are in progress, does it remain valid once hostilities have ceased? The Committee is of the view that this question should be answered in the affirmative. In the first place, Chapter VII is concerned not only with the restoration of peace, but also with its maintenance. Secondly, the effective functioning of the Tribunal after the end of hostilities is a key factor affecting its credibility and hence its ability to achieve its purposes. This does not, moreover, mean that that Tribunal should be a permanent body. It would be for the Security Council to terminate the Tribunal if it determined that the latter was no longer serving the purposes for which it had been created.

## G. Possible role of the General Assembly

41. The Committee believes that it is not within its purview to take a position on whether a resolution of the Security Council should be used for the purpose of establishing the proposed Tribunal. That is a matter of judgement that is exclusively political in nature. However, the Committee maintains that such a step is juridically possible provided that the Council acts under Chapter VII of the Charter of the United Nations and that the body set up has ad hoc jurisdiction, limited to what the Council deems necessary to restore and maintain international peace and security.

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14/ Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

15/ But not exclusively: Article 41 also envisages the severance of diplomatic relations.

42. The Committee does not believe, however, that the General Assembly, acting in the absence of any consideration of the matter by the Security Council, could, by means of a resolution, establish an ad hoc international jurisdiction.

43. While the Charter vests in the Council "primary responsibility for the maintenance of international peace and security", 16/ it does not give the General Assembly the authority to adopt mandatory resolutions. The Assembly's powers are limited to making recommendations in accordance with the provisions of Article 10 and, as appropriate, Articles 11, 13 and 14.

44. It does not follow, however, that the General Assembly can play no role in the process of establishing an ad hoc Criminal Tribunal. It could become involved if the Security Council deems it useful to refer certain issues raised by the drafting of a statute for the Tribunal to the Assembly for its consideration.

## H. Alternative solutions

45. Although the Committee maintains the establishment of an ad hoc Tribunal by a resolution of the Security Council adopted under Chapter VII is a juridically possible response to the crimes committed in the territory of the former Yugoslavia, the Committee considered whether "mixed" solutions combining United Nations involvement and the involvement of certain individual States might not be conceivable.

46. If an international criminal jurisdiction is not established, the following measures could be explored:

(a) Still acting under Chapter VII, and hence by means of decisions that are binding on those to whom they are addressed, the Security Council could invite States in whose territory crimes are committed to bring the perpetrators to trial;

(b) Along the lines of discussions that are under way within the Council of Europe, 17/ tribunals whose members would include a specific number, to be determined, of both national judges and prominent individuals from other countries appointed by an international body could be set up under the national laws of the States which have come into existence as a result of the breakup of the former Yugoslavia or of some of those States for the purpose of trying the perpetrators of war crimes and crimes against humanity;

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16/ Art. 24, para. 1.

17/ These discussions, however, are focusing more on the possible establishment of new judicial bodies having jurisdiction for human rights than on the establishment of criminal tribunals.

(c) Another possible solution would be a single international Tribunal having a basis in the domestic laws of the States which have emerged from the former Yugoslavia. In this case, the States would enact legislative provisions relating to the establishment of the Tribunal, recognizing the legitimacy of its involvement and referring to the rules adopted by international agreement to settle matters relating to jurisdiction, penalties, prosecution and so forth. The Tribunal itself would be set up either directly by a resolution of the Security Council or by a Convention concluded between the States to which authority has been delegated by the Security Council for that purpose;

(d) A final possibility would be for the Security Council to set forth the principle of establishing an International Criminal Tribunal and to entrust to some States or a group of States the task of seeing to it that this is done by means of a treaty to be concluded by them.

47. However, even when the so-called principle of "universal competence" applies, according to which States holding individuals suspected of war crimes and crimes against humanity have a duty, under many international conventions, to punish or extradite them, most of these solutions have one obvious drawback: implementation of these solutions is dependent on the goodwill of the States concerned, and this casts much doubt on their effectiveness, at least in the present circumstances.

48. None the less, the last-mentioned possibility does not have this disadvantage. On the contrary, it presents the advantage of solving the problem of the legitimacy of intervention by a limited number of States. In addition, it would be consistent with the spirit of the Charter, in particular Article 41, in that the Security Council, instead of taking all necessary action itself, would invite some Members of the United Nations to implement the measures that are needed. Nevertheless, even though the drafting and ratification of a treaty concluded between a limited number of States is likely to take less time and pose fewer problems than the conclusion of a universal treaty, such a procedure, which would be set in motion following a decision by the Security Council, would probably not come off very quickly.

## II. THE COMPETENCE OF THE TRIBUNAL

### A. Necessary balance between different considerations

49. The Committee dwelled at great length on questions relating to the competence of the Tribunal and the applicable law. It became apparent that these problems are the most difficult to resolve from the technical point of view and that, politically, they are the most sensitive.

50. A satisfactory balance must be found between the following considerations:

(a) Limiting the powers of the Tribunal to the purpose for which it is created, which can only be, at least if the Tribunal is established pursuant to a resolution of the Security Council adopted under Chapter VII of the Charter (see part I, sect. E, above), the restoration of international peace and security, on the one hand, and the concern not to establish a "one-off" jurisdiction, on the other;

(b) A credible jurisdictional mechanism serving as a deterrent to the perpetrators of atrocities at all levels, on the one hand, and the necessity of avoiding the establishment of very cumbersome and bureaucratic judicial machinery, on the other;

(c) The international character of the crimes to be punished, on the one hand, and the fact that the Tribunal's jurisdiction would be limited to trying crimes committed during a specific time-period in a given territory, on the other;

(d) The principles of public international law, on the one hand, and the principles of criminal law and criminal procedure, on the other.

51. These requirements are not contradictory. The proposals adopted by the Committee respond to the concern to reconcile the various considerations with respect to the Tribunal's jurisdiction ratione materiae, ratione loci, ratione temporis and ratione personae, and the related, but essential problem of the applicable law.

### B. Necessarily limited role of domestic laws

52. In this regard, the essential starting-point would seem to be the international character both of the crimes themselves and the institution which will be entrusted with the task of judging them. Accordingly, unlike the possibilities that would exist if certain alternative models were to be adopted, 18/ it is unthinkable that the Tribunal should apply, both as regards procedure and as regards law, national rules that are specific to a given State or States.

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18/ See, for example, para. 46 (a), (b) and, perhaps, (c).

53. In no way does this mean that the domestic law of the States is of no relevance to either of those two areas. Firstly, there is common ground in the laws of all nations both with respect to the protection of basic human rights and with respect to criminal procedure. The recognition of this fact was, moreover, the starting-point and the justification for the establishment of the Nürnberg Tribunal. Secondly, this consideration is all the more cogent in the present case in that the States most directly concerned by the establishment of the Tribunal have emerged from the breakup of a single State, the former Yugoslavia, and appear to have preserved, at least as a transitional measure, many of the juridical institutions of the former State, particularly in the area of penal law.

54. It is particularly significant that the national Penal Code of the former Socialist Federal Republic of Yugoslavia (art. 125) contains provisions incorporating into domestic law all the grave breaches enumerated in the four Geneva Conventions and also other crimes as defined in other international conventions, including: "forced conversion to another religion, compelling an individual to engage in prostitution, the use of measures of intimidation and terrorism, collective penalties, unlawful internment in a concentration camp, forcible recruitment into the intelligence services or administration of the occupying Power, actions aimed at starving the population, and the levying of unlawful or excessive contributions or requisitions ...".

55. Moreover, the Socialist Federal Republic of Yugoslavia was a party to nearly all the existing international conventions on the protection of human rights 19/ and some of the successor States have made declarations concerning succession to some, if not all 20/ of these conventions, which may therefore be invoked against them. 21/ The "Federal Republic of Yugoslavia (Serbia and

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19/ In particular the four Geneva Conventions of 1949 and the additional protocols thereto of 1977, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the two International Covenants on Human Rights of 1966 and the two Conventions against slavery, of 1926 (as amended in 1953) and 1956, International Labour Organisation Convention No. 29 concerning forced labour of 1930, the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the 1989 Convention on the Rights of the Child.

20/ Within the time allotted to it, the Committee was unable to gather complete information on this point.

21/ On 11 May 1992, Croatia made a declaration of succession to the four Geneva Conventions of 1949 and the two Protocols of 1977. Bosnia and Herzegovina and Slovenia made similar declarations, the former on 31 December 1992 and the latter on 25 June 1991 (as regards the Conventions) and 26 March 1992 (as regards the Protocols).

Montenegro)", for its part, considers itself to be the continuation of the former Socialist Federal Republic of Yugoslavia.

56. These facts establish beyond all question that, under the domestic law of the States which have come into existence following the breakup of the former Yugoslavia, the violation of these Conventions is subject to criminal charges; that the perpetrators of such violations cannot legitimately claim to have acted in accordance with national law; and that, from this point of view alone, punishment for the abominable deeds they have committed is indisputably consistent with the principle nullum crimen sine lege (see part I, sect. A, above).

## C. International characterization of crimes

57. These considerations do not, however, exhaust the question of the applicable law, for an international judicial body cannot render a judgement on the basis of domestic law, even though that law may recapitulate the rules of general international law.

58. As the United Nations International Law Commission has rightly emphasized, "the characterization of an act or omission as a crime against the peace and security of mankind 22/ is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization". 23/

59. In international law, this characterization has several bases and is derived from a number of "sources" (in most cases, more than one at the same time):

(a) The general principles of law recognized by the community of nations, which formed the legal basis for prosecution before the Nürnberg Tribunal (see part I, sect. A, above) and to which reference is made in article 15, paragraph 2, of the International Covenant on Civil and Political Rights of 1966 and article 7, paragraph 2, of the European Convention on Human Rights;

(b) The large number of international conventions in existence today which have codified and spelt out these principles; 24/

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22/ This applies, in general, to all international crimes.

23/ Article 2 of the draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading by the International Law Commission in 1991.

24/ See the non-exhaustive enumeration in footnote 19.

(c) Well-established general rules of customary law which, for the most part, are merely set forth in these conventions. 25/

60. The Committee considered the matter of the basis to be adopted for the Tribunal's competence in the present instance. There are two alternatives:

(a) Either its Statute would refer to existing conventions, which would be expressly mentioned in the Statute;

(b) Or it would enumerate the crimes which the Tribunal would be called upon to punish without making reference to any specific convention or conventions.

61. The practical result would be the same, since, clearly, the list of crimes in the second alternative would be drawn up mainly by reference to existing conventions. But the implications of the two approaches are very different:

(a) Specific reference to certain conventions would supplement the mere listing of crimes with an additional factor of legitimacy in that the most important conventions have been broadly ratified; in addition, in the present case, the States concerned are bound by nearly all of the relevant treaties;

(b) Conversely, however, this approach may obscure the fundamental fact that the crimes in question are punishable whether or not the States in question have ratified the relevant convention. 26/ It is, furthermore, questionable whether a tribunal established by means other than a convention should be asked to punish the violation of rules set forth in one or more conventions, some of which, moreover, provide for their own monitoring procedures.

62. A middle ground would be to enumerate the crimes envisaged while specifying that what is involved is crimes "specified, inter alia," in one or another international convention. The Committee, however, is of the view that considerations of principle militate in favour of the technique of enumeration.

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25/ Cf. the articles common to the Geneva Conventions of 1949, which refer to the "principles of the law of nations".

26/ The prohibition of genocide is no less binding on Angola, which has not ratified the 1948 Convention on the Prevention and Suppression of the Crime of Genocide, than on France, which has. Cf. the advisory opinion of the International Court of Justice of 28 May 1951, rendered on the subject of reservations to the Convention: "The principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (ICJ Reports 1959, p. 23; see also ICJ Reports 1986, p. 114).

D. Competence ratione materiae - punishable crimes

63. Whichever approach is adopted - enumeration or reference - the question of the Tribunal's competence ratione materiae remains unresolved.

64. The Committee considers that a basis for resolving this question should be sought in the four Geneva Conventions of 1949, which have been ratified by nearly every State in the world 27/ and which have been referred to in several Security Council resolutions dealing with the Yugoslav crisis, 28/ in particular the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 147 of which defines the "grave breaches" which States parties are required to punish. This list is more or less coterminous with that contained in article 3, which is common to the four Conventions and which prescribes the minimum rules that are also applicable in the case of armed conflict not of an international character.

65. One might have considered going no further than this list out of a concern for "readability", pointing out that these Conventions enjoy the unanimous support of States and that, what is more, all the crimes that are currently being committed in the former Yugoslavia can be related to that list. Such a limitation would, however, have serious drawbacks:

(a) It would seem paradoxical in the context of the former Yugoslavia not to mention genocide as such or, in any event, the factors that constitute genocide, or indeed "ethnic cleansing" directly, and not to refer to the persecution directed against members of "a national, ethnical, racial or religious group, as such"; 29/

(b) The 1949 Conventions are old and it seems difficult not to take into account subsequent developments in the law, as reflected, inter alia, in the two Protocols of 1977. 30/

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27/ Ratifications as at 31 January 1993: first Geneva Convention: 170 - second Geneva Convention: 168 - third Geneva Convention: 174 - fourth Geneva Convention: 164.

28/ Cf. resolutions 764 (1992) of 13 July 1992; 771 (1992) of 13 August 1992; and 780 (1992) of 6 October 1992.

29/ Cf. art. II of the 1948 Genocide Convention.

30/ Certain States have not ratified some of these instruments, for reasons unrelated to the problem under consideration. The difficulty that might result from this situation if the Statute of the Tribunal contained express references to the Conventions or Protocols would be overcome if the Statute recapitulated the list of crimes enumerated in those instruments without making express reference to them.

## E. Categories of punishable crimes

66. If the Statute of the Tribunal were to refer solely to the Geneva Conventions, it would be impossible to make a distinction between the different "grave breaches" enumerated therein without differentiating among such breaches according to whether or not they are of a mass and systematic nature. 31/

67. However, if, instead of simply referring to the 1949 Conventions, the Statute of the Tribunal recapitulates the enumeration of grave breaches contained therein and the list of crimes set out in article 3, common to the four Conventions, which is applicable in the case of armed conflict not of an international character as well as in the event of a war (see part II, sect. D, above), the competence of the Tribunal may be limited to the most heinous crimes.

68. Such was the position taken in the London Agreement of 8 August 1945, which restricted the competence of the Nürnberg Tribunal to "major criminals whose offences have no particular geographical location", all other criminals being "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein". 32/ Transposing this provision to the present case would be difficult. Firstly the crimes to be prosecuted seem, for the most part, to have a rather precise geographical location. Secondly, the places in question are not, unfortunately, "liberated" and this circumstance is one of the justifications for the establishment of an international Tribunal.

69. Nevertheless, in the Committee's opinion, the competence of the Tribunal should be limited to the most serious war crimes, those committed on a mass and systematic scale, causing particular revulsion and calling for an international response. That limitation, which is also motivated by the concern not to encumber the Tribunal with cases that are less representative, would in no way let the perpetrators of crimes not in this category go unpunished: they would remain subject to the enforcement system of the Geneva Conventions.

70. On the other hand, the Committee believes that this limitation should not apply to crimes against humanity, especially those which target groups as such, which are by nature collective and which form part of a deliberate criminal policy.

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31/ See article 147 of the fourth Geneva Convention.

32/ Second preambular paragraph; see also article 1.

## F. Competence ratione loci

71. The problems raised by the competence ratione loci of the Tribunal are infinitely less difficult, if only because the letter dated 16 January 1993 from the Minister of State (see annex II), constituting the mandate of the Committee, refers exclusively to crimes "committed in the territory of the former Yugoslavia".

72. That also applies to the relevant resolutions of the Security Council, 33/ and it is quite clear that since the legal basis for the establishment of any ad hoc tribunal by the Council derives exclusively from the latter's competence under Chapter VII of the Charter, the Council can act only in the context of what is strictly necessary to restore and maintain peace. The Council therefore cannot vest in the Tribunal - which under Article 29 of the Charter would be one of its subsidiary organs - geographical competence that the Council itself does not enjoy.

73. On the other hand, the Council might, by strictly applying the law, limit the competence of the Tribunal to crimes committed only in certain parts of the territory of the former Yugoslavia. The Committee takes the view that such a limitation would have a disastrous effect in that it would prejudge the guilt of some and the innocence of others - innocence to be protected by the strict principles suggested with regard to prosecution (see part III below).

## G. Competence ratione temporis

74. The same caution is called for in connection with the competence of the Tribunal ratione temporis.

75. Among the crimes that the Tribunal would be responsible for trying are crimes against humanity, to which statutory limitations do not apply. The first question, therefore, is whether the Tribunal should be given competence in regard to such crimes, irrespective of when they were committed.

76. On this point, the Committee takes the view that it would not be reasonable to extend the competence of the Tribunal to crimes predating the dissolution of the former Yugoslavia and the outbreak of the current conflicts. Such competence could hardly be justified by reference to Chapter VII of the United Nations Charter, under which the establishment of a tribunal would be authorized only for the purpose of maintaining or restoring peace, not in order to punish earlier crimes. Lastly, it should be noted that not attributing competence to the Tribunal in regard to such crimes would in no way preclude prosecution in the ordinary courts.

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33/ See footnote 28 above.

77. It therefore appears appropriate to attribute competence to the Tribunal only in respect of crimes committed during the period beginning with the dissolution of the former Yugoslavia.

78. It is admittedly difficult to pinpoint the moment of that dissolution.

79. It might be the date of resolution 713 (1991) - 25 September 1991 - the first of 26 resolutions on the situation in Yugoslavia adopted by the Security Council in the past 18 months. While, however, the mere fact of its adoption confirms that a threat to peace existed on that date, as duly noted by the international community, it can be assumed that adoption came after the outbreak of hostilities. There would be even more justification for the same objection with regard to the later resolutions. In terms of the principles involved, there would be no reason to authorize the punishment of crimes against humanity only from the date of Security Council action.

80. It is therefore appropriate to go back to the beginning of the process of dissolution of the former Yugoslavia. The most significant dates in that respect are:

(a) 25 June 1991 - Proclamation of independence by Croatia and Slovenia;

(b) 27 June 1991 - Federal Army intervention in Slovenia;

(c) 3 July 1991 - Outbreak of clashes between Serbian and Croatian militias;

(d) 1 April 1992 - Outbreak of clashes between Serbian and Muslim militias, and beginning of the siege of Sarajevo, one month after the referendum on the independence of Bosnia and Herzegovina.

81. In considering this chronology, the Committee took the view that while the outbreak of hostilities could be traced back to 27 June 1991, the choice of that date might give rise to misinterpretation and reflect some prejudice. It believes that 25 June, the date of the first legal move towards dissolution of the Socialist Federal Republic of Yugoslavia, is a more neutral date, and consequently more appropriate.

## H. Competence ratione personae

82. Determination of the competence of the Tribunal ratione materiae (see part II, sects. D and E, above) will largely influence determination of its competence ratione personae: the perpetrators of crimes listed in the Statute of the Tribunal or in instruments referred to therein may be brought before the Tribunal.

83. The Committee is aware, however, that the concept of "perpetrator" covers very different situations. It believes that a distinction should be drawn between three levels of responsibility.

84. The highest level is occupied by the policy makers, those who turned the violation of basic human rights and the laws of war into a permanent system for attaining political objectives.

85. Yet when it comes to prosecuting them, one difficulty arises: the traditional concepts of incitement to commit offences and of criminal intent do indeed cover the hypothesis, but do not allow for effective action. On the basis of those concepts, the specific criminal role of leaders would be identified only when those who actually committed the offences are being tried, and in most cases it would be very difficult to show the link between each offence and general directives from afar. Such a criminal role would thus remain unpunished.

86. It would be another matter if, as in the case of the Nürnberg trials, "formulation or execution of a common plan or conspiracy to commit any of the ... crimes" coming within the jurisdiction of the Tribunal (crime of "conspiracy"), 34/ were to be treated as a separate offence. This is the solution to be adopted.

87. At the intermediate level, the orders of superiors are issued. Unlike the general directives, the purpose of which is to establish a political system dependent on the necessary commission of crimes (see paragraph 84 above), these orders lead to acts that are the constituent elements of crimes.

88. Yet here again, the concept of complicity does not seem adequate:

(a) The content of the orders is not always precise enough for complicity to be established;

(b) No sanctions would be available in the case of orders that were not followed up.

89. It therefore seems legitimate to define as an offence in itself the decision to use authority in a criminal fashion, instead of viewing it as mere complicity in the offence of the actual perpetrator. Psychologically, that restores the balance of responsibilities.

90. Nevertheless, in the Committee's opinion, the deeds done at the subordinate level should also be liable to prosecution. The reminder to the actual perpetrators that they are individually responsible for their own actions is a necessary measure of preventive intimidation, and is probably more effective among the rank and file than at the top.

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34/ Article 6, third paragraph, of the Charter of the Nürnberg Tribunal.

91. It is all the more essential that the Tribunal should be competent in respect of - and only in respect of - crimes committed on a mass and systematic scale. That would substantially reduce the risk of submerging the international jurisdiction in so many cases that it would be unable to function effectively (see part II, sect. E, above).

## I. "Criminal groups"

92. In addition, membership in a de jure or de facto group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the Tribunal would constitute a specific offence.

93. That was the solution adopted in articles 9 and 10 of the Charter of the Nürnberg Tribunal, and it can be related to well-known concepts in penal law, such as criminal association or conspiracy.

94. Two precautions should, however, be taken so as to avoid any shift towards an unacceptable form of collective responsibility. The first would be to confer on the Tribunal competence to declare a group to be criminal in a separate decision. 35/ The second would be to allow as a defence - retroactively, if need be - any spontaneous withdrawal by an individual from such a group.

## J. Defence of obeying the orders of a superior or performing official duties

95. If it is logical to divorce the actual carrying out of the act from its remote source (directives) or its proximate source (orders of superiors), by the same token, the carrying out of the act should in turn be examined per se. The order of a superior, in itself, cannot serve as a defence. The possibility that, in the circumstances, the subordinate had no choice but to carry out the order cannot, however, be ruled out. It therefore seems reasonable to rely on the Nürnberg precedent 36/ followed in national judicial practice, and take the view that the fact that an individual charged with a crime before the Tribunal obeyed an order of a superior "does not relieve him of ... responsibility if, in the circumstances at the time, it was possible for him not to comply with that order". 37/ That leaves room for mitigation of responsibility.

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35/ Cf. article 9 of the Charter of the Nürnberg Tribunal.

36/ Cf. article 8 of the Charter of the Nürnberg Tribunal.

37/ Article 11 of the draft Code of Crimes against the Peace and Security of Mankind, prepared by the International Law Commission.

96. Conversely - and here again in keeping with the Nürnberg precedent - it should be reaffirmed that the fact that a person was performing official duties in no way constitutes a factor relieving him of responsibility. "Act of State" does not exist.

## III. PROSECUTIONS AND PROCEEDINGS

### A. General principles applicable to prosecutions

97. The options in regard to investigations and prosecutions may seem to be more exclusively of a technical nature. Nevertheless, they do affect the credibility of the whole institution.

98. If the precise operating procedures of the Tribunal at this level are established on the basis of purely abstract considerations in terms of what would be an ideal solution, without regard for the international realities and the situation on the ground in the former Yugoslavia, the project will not see the light of day, and, at best, the Tribunal's work will remain purely symbolic. If, on the other hand, the solutions are prompted by the concern to establish effective mechanisms without sacrificing the fundamental principles of criminal procedure and the humanist values that are to be defended, Utopia may turn into reality and the Tribunal may be able to function effectively.

99. On that basis, the Committee considers, first of all, that the prosecuting authority should enjoy some leeway, either in waiving or in discontinuing proceedings. That would introduce a useful element of flexibility in enforcement, provided that the principle of equality before the law is not called in question. 38/ With a view to ensuring respect and avoiding arbitrary action in this area, the decision on discretionary prosecution should be taken only by a collegial body (see part V, sect. E, below), should state the grounds on which it is based, should be inspired by the principle of individualization, and should fully respect the rights of victims.

100. Secondly, it does not seem reasonable to admit civil actions before the Tribunal. That would lead to a flood of claims, which the international court would not be in a position to process effectively. It seems preferable to proceed from the principle that it will be for the national courts to rule on claims for reparation by victims or their beneficiaries.

101. Lastly, the Committee takes the view that a single commission should be instructed to conduct investigations, to decide, on a collegial basis, whether to prosecute offences before the Tribunal, and if it so decides, to argue the case for the prosecution before the Tribunal.

### B. Referral to the Commission for Investigation and Prosecution

102. As the Committee has indicated (see part I, sect. E, above), the establishment of an international Tribunal to prosecute crimes committed in

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38/ The principle of discretionary prosecution was set forth in recommendation No. R (87) 18, adopted by the Committee of Ministers of the Council of Europe on 17 September 1987.

the former Yugoslavia would not happen ex nihilo. It would come as the logical follow-up to initiatives already taken within the United Nations, two of which are particularly significant:

(a) In resolution 1992/S-1/1, adopted on 14 August 1992, the United Nations Commission on Human Rights requested:

> "its Chairman to appoint a special rapporteur to investigate first-hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina, and to receive relevant, credible information on the human rights situation there from Governments, individuals, intergovernmental and non-governmental organizations, on a continuing basis, and to avail himself or herself of the assistance of existing mechanisms of the Commission on Human Rights".

Having been appointed Special Rapporteur, Mr. Tadeusz Mazowiecki made several visits to the former Yugoslavia, accompanied by four thematic rapporteurs, and in accordance with his mandate, gathered and compiled "systematically information on possible violations of human rights in the territory of the former Yugoslavia, including those which may constitute ... crimes". As the Commission on Human Rights noted, such information (presented in three reports) "could be of possible future use in prosecuting violators of international humanitarian law";

(b) For its part, the Security Council in resolutions 771 (1992) of 13 August 1992 and 780 (1992) of 6 October 1992, called upon States and humanitarian organizations to collate and make available to it:

> "substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia".

In addition, resolution 780 (1992):

> "Requests the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia."

This five-member Commission, with Mr. F. Kalshoven as Chairman and Mr. C. Bassiouni as Rapporteur, began its work in October 1992.

103. Thus, abundant documentation on crimes committed in the territory of the former Yugoslavia has already been gathered by impartial and competent

experts, and could be made available to the Commission for Investigation and Prosecution as soon as it is established. It would also be useful for such collaboration between the Tribunal and the Mazowiecki and Kalshoven Commissions to continue - according to procedures to be worked out - after the Tribunal begins its work. Consideration might be given to the possibility of having those bodies refer matters to the Commission for Investigation and Prosecution.

104. That right of referral may also be extended to certain humanitarian organizations, a list of which might be drawn up by the Security Council. In any event, the Commission for Investigation and Prosecution should also be able to intervene ex officio.

### C. The investigation - gathering of evidence

105. When it takes that decision, it will be for the Commission to confirm the evidence already gathered and to seek further evidence for and against the accused, strictly respecting the rights of the defence (see part III, sect. F, below) as it undertakes all useful investigatory measures, such as:

(a) Questioning of the accused;

(b) Hearing of victims and witnesses;

(c) Confrontation of witnesses;

(d) Commission of experts;

(e) Character checks;

(f) Compilation of pertinent written and audio-visual material;

(g) Visits to the scene.

106. The Statute of the Tribunal should contain a provision whereby States would be obliged to extend cooperation, in particular that of their judicial investigation services to the Commission. However, there is probably no reason for this provision to be very detailed, especially if the Tribunal is to be established by a Security Council resolution adopted within the framework of Chapter VII of the Charter, Article 48 of which makes it an obligation for the Members of the United Nations to take "the action required to carry out the decisions of the Security Council for the maintenance of international peace and security".

D. "Transfer" of prosecuted persons - extradition - imprisonment

107. At least from the legal standpoint, this should also facilitate the transfer of accused persons to the Tribunal, where appropriate.

108. The Committee does not exclude the possibility of taking proceedings against defendants in their absence - a solution clearly dictated by realism. The details of the proceedings would have to be laid down in the Tribunal's rules, which should indicate that, since the trial is being conducted in the absence of the defendant, he cannot be represented by counsel and no one can put questions to witnesses and experts on his behalf. In accordance with the general principles of criminal law, the judgement would be annulled if the accused person is arrested or gives himself up. In the case of either of these occurrences during proceedings conducted in the defendant's absence, the trial must be discontinued; in either event, the Tribunal should refer the case to the Commission for Investigation and Prosecution so that proceedings may be started once again. However, judgement in the defendant's absence must be a last resort, and every effort must be made to ensure that the defendant effectively appears, so that the judgement cannot be challenged and the trial is of an exemplary nature.

109. It should be stressed that the issue of the transfer of accused persons to the Tribunal would arise in a form that differs from that of classic extradition problems:

(a) Firstly, subject to a hypothetical examination of the lawfulness thereof, 39/ the obligation to transfer the accused person that would be laid down in the Statute would be derived not from a treaty-based obligation but from the duty of States Members of the United Nations to implement the decisions of the Security Council;

(b) Secondly, the beneficiary of the obligation to transfer the accused person would not be another State but an international court, which would facilitate the transfer to the Tribunal for requested States, without any need to conduct the proceedings and invoke the substantive requirements often specified by domestic laws on extradition. 40/

110. Similarly, it is interesting to note that, although it is entitled "Extradition and punishment of war criminals", General Assembly

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39/ Cf. ICJ, order of 14 April 1992, Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie, Reports, 1992, p. 3; see p. 15 in particular.

40/ For the same reasons, it can be assumed that a request by the Tribunal for the transfer of an accused person would have priority over a request for extradition made by a State.

resolution 3 (I), of 13 February 1946, recommended that States should "take all the necessary measures" to send back to the countries in which their abominable deeds had been done those responsible for the crimes set forth in the London Agreement, without specifically mentioning extradition as such a measure. Moreover, Jean Pictet, in his authoritative commentary on the 1949 Geneva Conventions, emphasizes that the principle of universal jurisdiction laid down in the Conventions in no way precludes the transfer of accused persons to an international tribunal. 41/

111. Furthermore, article 1.F of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, ratified by 111 States (including the former Yugoslavia), prohibits States parties from granting refugee status to any person with respect to whom there are serious reasons for considering that:

> "(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> "...
>
> "(c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

112. Naturally, these principles do not, in and of themselves, guarantee the effective transfer to the Tribunal of persons accused of having committed war crimes or crimes against humanity; however, there are no insurmountable legal objections to the transfer of accused persons if the requested States have the political will to effect the transfer.

113. Assuming that that is the case, it would be for the Commission for Investigation and Prosecution to decide on the imprisonment of a person in respect of whom there may be charges where imprisonment is required for the purposes of the investigation, or where there is a serious risk that the accused person will abscond. However, in accordance with the fundamental principles of the law of criminal procedure, 42/ the defendant must be able to take proceedings before one of the Judges of the Tribunal in respect of a detention measure.

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41/ See Jean Pictet, Director, Commentaires de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, International Committee of the Red Cross, Geneva, 1956, p. 635.

42/ See article 9, para. 4, of the 1966 International Covenant on Civil and Political Rights.

## E. Referral to the Tribunal

114. When the Commission believes that the investigation has been completed, it could take one of the following - reasoned - decisions:

(a) Simple dismissal, if the charges are insufficient; 43/

(b) Transfer to an independent, impartial national tribunal if the offences, although flagrant, have not been committed in a mass and systematic manner. 44/ In this event the national tribunal to which the case would be transferred would be obliged to be seized of the matter and render a decision on it;

(c) Referral to the Tribunal by means of an indictment setting forth the facts and listing the charges.

## F. The rights of the defence

115. The Committee believes that the question of respect for the rights of the defence does not give rise to any particularly difficult technical problems. It noted that the rights in question were safeguarded - if not in the same terms, at least in accordance with the same principles - both by the Charters of the International Military Tribunals set up following the Second World War 45/ and by the various proposals setting up international criminal courts that it consulted.

116. Naturally, it is of the greatest importance that the defendants should benefit fully from all the guarantees provided by contemporary criminal procedure systems. The guarantees in question are felicitously and precisely summarized in article 14 of the International Covenant on Civil and Political Rights of 16 December 1966, which as at 31 January 1993 had been ratified by 112 countries, including the former Yugoslavia.

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43/ In such a case, it might be appropriate for the Commission to be able, if it believes circumstances so dictate, to grant compensation to the person discharged. Cf. ibid., para. 5.

44/ This possibility would be excluded if the Statute of the Tribunal confined itself to referring to the 1949 Geneva Conventions with respect to competence ratione materiae (see part II, sect. D, above). It should not be confused with the power that could be given to the Tribunal itself to relinquish jurisdiction, where appropriate, for the benefit of a national court, even though the requirements for the Tribunal to exercise competence might be met (see part IV, sect. C, below).

45/ See article 16 of the Charter of the Nürnberg Tribunal and art. 9 of the Charter of the International Military Tribunal for the Far East.

117. In the Committee's view, the Statute of the Tribunal should reproduce, with appropriate drafting changes, the provisions on criminal procedure set out in paragraphs 2 and 3 of article 14 of the Covenant, which, as stressed by the United Nations Human Rights Committee, must apply to "all courts and tribunals ... whether ordinary or specialized" and whose requirements "are essential for the effective protection of human rights". 46/

118. It would also be helpful to include in the Statute a provision guaranteeing the defendant's right to have the assistance of counsel.

119. It should be noted, on the other hand, that other provisions of the 1966 Covenant applicable to national criminal procedure are not transferable to the international order. This is so particularly in the case of article 15, which - after enunciating the nullum crimen sine lege principle, which is applicable to both international and domestic law (see part I, sect. A, and part II, sect. C, above) - adds that:

> "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

120. This is the fundamental justification for putting on trial those responsible for international crimes.

## G. Reference to the rules of procedure

121. Without prejudice to the rights of the defence, which must be safeguarded by the Statute of the Tribunal itself, the Committee believes that procedural details should be laid down by the Rules of the Tribunal, and that they should be in keeping with the provisions of the Statute itself and general principles governing the law of criminal procedure.

122. It is important that the text of the Rules be limited to what is strictly necessary. Only a brief, comprehensible Statute can be drafted and adopted within a reasonable period of time, and it is essential that it be concise and "readable" so as to interest the public at large and gain public support, both of which are so necessary.

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46/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40), p. 144.

## IV. JUDGEMENT AND SENTENCE

### A. Pronouncement of judgement

123. As in the case of all preceding courts, the very idea of a collegiate court means that the judgement must be rendered by a majority of the members of the Chamber. If the Chamber is made up of five Judges, as suggested by the Committee (see part V, sect. B, below), it is not helpful to provide that the vote of the President should be decisive, because the principle that alternates should attend hearings from start to finish and be able to replace any member of the Tribunal who is unable to be present would provide virtually total assurance that the membership of the Chamber could be completed (see part V, sect. B, below).

124. It is clearly essential that the reasons on which the judgement is based be given, in accordance with the general principles of law recognized by all nations and all precedents. 47/ Any revision proceedings (procédure de réformation) for which provision would appear to need to be made (see part IV, sect. F, below) would be made impossible if the reasons on which the judgement is based are not given. The Tribunal's considerable freedom with respect to the scale of penalties is a further reason for making the statement of reasons a strict obligation (see part IV, sect. B, below).

125. On the other hand, despite the actual practice of the Nürnberg Tribunal, for which no provision was made in its Charter, the Committee does not consider it legitimate that the Judges should be able, in criminal matters, to combine the statements of their individual or dissenting opinions.

126. In accordance with the universally accepted principles reflected in article 14, paragraph 1, of the 1966 International Covenant on Civil and Political Rights, judgement should be rendered in public. However, it would appear to be desirable to leave it to the Tribunal to decide whether or not to make public the names of some witnesses or victims, if the persons in question need protection from reprisals or unjustifiable social opprobrium (particularly in the case of rape).

### B. Sentence

127. In the Committee's view, there are a number of reasons for having a broad range of sentences to be handed down by the Tribunal:

(a) The particularly heinous nature of crimes in respect of which perpetrators are to be prosecuted precludes limiting the penalties to those of a pecuniary or symbolic nature;

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47/ See article 26 of the Charter of the Nürnberg Tribunal, in particular.

(b) On the other hand, the Committee strongly opposes the death penalty; however abominable the offences in question may be, "if a democracy applies to terrorists the logic of death applied by them, it is endorsing the values of the terrorists themselves"; 48/

(c) By process of elimination only rigorous imprisonment remains.

128. The Committee considered establishing a scale of penalties. It concluded, however, that such an approach would introduce excessive inflexibility: a priori and by definition, the Tribunal would have jurisdiction over extremely serious crimes (see part II, sects. D and E, above), but justice becomes injustice if it is blind, and it would be unacceptable for the Judges not to be able to take into account, in setting the length of the sentence, the circumstances in which the offence was perpetrated and the personality of the offender.

129. With regard to the circumstances in which the offence was committed, the sentence should reflect, in particular:

(a) The gravity of the offence (intention, premeditation, motives and goals of the perpetrator, state of mind that led to the criminal act, etc.);

(b) The values safeguarded by treating the act as a serious crime (human dignity, right to life, right to physical and/or moral integrity, and right to own property);

(c) The extent of the harm caused (either harm actually caused or the threat to cause harm, number of persons involved, and value of the property affected).

130. With regard to the personality of the perpetrator, the Tribunal could, for example, take account of his background and personal situation, as well as his conduct following the offence.

131. The fundamental principles of proportionality and individualization of the sentence would thus be safeguarded; it must be stressed that it is essential that the sentence indicate, possibly briefly but precisely, the grounds for the Tribunal's decision.

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48/ Address by Mr. Robert Badinter, Minister of Justice, to the Senate on 28 September 1981 (J.O.R.F, Débats parlementaires, Sénat, 29 September 1981, p. 1665).

C. Non bis in idem - concurrence of international and national jurisdictions

132. The concurrence of international and national jurisdictions, made possible through the establishment of the Tribunal, gives rise to great problems.

133. The difficulties in question cannot be solved by means of mechanical implementation of the non bis in idem principle. As set forth in article 14, paragraph 7, of the 1966 Covenant, this principle has the purpose of avoiding the irrational and unjust consequences of the accumulation of national criminal competences, if such accumulation were to lead to an accumulation of sentences and penalties. 49/ However, once a competent international court has been established, this principle must be combined with the principle of giving priority to the international decision. 50/

134. There is, however, a third factor to take into account: a national jurisdiction should not be deprived of its powers if it is likely to prove more effective than the international jurisdiction.

135. Implementation of the following rules would reconcile these requirements:

(a) It is not helpful to lay down the principle of any lis alibi pendens exception: it is only once the Tribunal has rendered a final judgement, whether such judgement constitutes a conviction or an acquittal, that the principle of international priority comes into play: the taking of such a decision would mean that a domestic judgement in respect of the same acts, even if rendered prior to the Tribunal's decision, would be without effect;

(b) With regard to implementation, the hypothesis that two irrevocable decisions - one domestic and the other international - would only partly cover the same acts should be left aside; 51/

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49/ It can, moreover, be noted that, in its report on communication 204/1986, X v. Italy, 2 November 1987, the Human Rights Committee expressed the view that article 14 of the Covenant "[prohibited] double jeopardy only with regard to an offence adjudicated in a given State". Selected decisions of the Human Rights Committee. October 1982 - April 1988, volume II.

50/ The drafting of article 15 of the Covenant is based, mutatis mutandis, on such considerations where the implementation of the non bis in idem principle and its reconciliation with the possible existence of an international indictment are concerned.

51/ This should be done by means of a method of imputation giving due priority to the international decision.

(c) It would seem, lastly, that there would only be advantages in the international court being able to relinquish its own jurisdiction to national courts, fairly exercising jurisdiction, particularly as regards the judgement of crimes perpetrated by persons who are merely executants (see part II, sect. H, above).

136. The possibility of relinquishing jurisdiction is recommendable both for practical reasons (decongesting the international court) and for political reasons. It would seem desirable, in fact, to restore as quickly as possible the exercise of normal jurisdiction to the courts of the States resulting from the breakup of the Socialist Federal Republic of Yugoslavia, and thus help to re-establish the normal operation of judicial authority in the countries in question.

137. Such a decision could be taken only by a chamber of the Tribunal, on the initiative, where appropriate, of the Commission for Investigation and Prosecution, and the reasons on which the decision is based would have to be given. In such an event, the case would be transferred to the competent national jurisdiction.

### D. Effect of judgements - the question of appeals

138. Article 14, paragraph 5, of the 1966 Covenant on Civil and Political Rights provides as follows:

> "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law."

139. However, as normally interpreted, this provision is regarded as implying that a remedy of judicial review (recours en cassation) at least exists, but not as laying down the principle of a right of appeal. 52/ Furthermore, the Nürnberg and Tokyo precedents and most proposals for the establishment of an international criminal court considered by the Committee provide no opportunity to appeal against the judgements of the Tribunals or the court. 53/

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52/ Moreover, France, whose criminal law does not provide for appeals in criminal matters, made an interpretive statement to that effect, accompanying its ratification of the Covenant.

53/ Some recent proposals, however, contemplate the institution of appeal proceedings (see, e.g. Mr. Cherif Bassiouni, "Draft statute of an International Criminal Tribunal", Nouvelle études penales, Erès, 1992, art. XXVIII).

140. The Committee believes that the practical difficulty of establishing appeals proceedings indicates that it is in fact not desirable that such proceedings be instituted. Moreover, the great formality of the trial and the publicity attracted by it would constitute major safeguards for the defendant, and the existence of revision proceedings (procédure de réformation) and review proceedings (procédure de révision) and the possibility of a pardon reduce yet further the need to establish appeals proceedings.

## E. Review proceedings (recours en révision)

141. Providing no possibility for review in the event of the discovery of a new fact likely to have a decisive impact on the judgement that was unknown to the Tribunal at the time when it rendered its judgement, would be most unjust. Furthermore, virtually all proposals for the establishment of an international criminal jurisdiction provide for and make arrangements for such proceedings.

142. Article 29 of the Charter of the Nürnberg International Military Tribunal gave the prosecution the initiative. Whatever the Nürnberg Tribunal's reasons were at the time, such an imbalance would be difficult to justify now and the Committee is convinced that a review should potentially benefit either the prosecution or the defence.

143. Accordingly, it should be possible for the proceedings to be instituted either by the person convicted or by the Commission for Investigation and Prosecution, which in this case would have to follow the same procedure as in the case of an initial referral, the investigation stricto sensu being entrusted to a different member of the Commission.

## F. Revision proceedings (procédure de réformation)

144. Moreover, review does not meet the requirements of article 14, paragraph 5, of the 1966 Covenant (see part IV, sect. D, above), which provides, in criminal matters, for a possibility of review (voie de cassation) or equivalent proceedings.

145. Prima facie, this approach gives rise to the same practical objections as those that arise in respect of an appeal and presupposes the establishment of extremely cumbersome judicial machinery. However, this obstacle would disappear if consideration of a request for revision (demande en réformation) 54/ could be entrusted to an already existing court.

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54/ The term "revision" ("réformation") would seem to be more neutral, from a technical point of view, than the word "review" ("cassation"). It basically represents the same reality, however.

146. The Committee therefore considered which court could be entrusted with such a task. The European Court of Human Rights comes to mind, but only a treaty-based approach would make it possible to overcome the numerous legal problems that would arise. However, it would be somewhat paradoxical to ask a regional court, however high its standing, to revise, where appropriate, judgements rendered by a tribunal established in a universal context and with a universal perspective.

147. It would be more natural to have recourse to the International Court of Justice, as the "principal judicial organ of the United Nations". 55/

148. However, one should not overlook the difficulties of instituting revision proceedings before the world Court:

(a) The judgements resulting therefrom would not apply, for the most part, to disputes between States, whereas only States may refer cases to the Court; 56/

(b) United Nations organs may, with regard to matters concerning them, apply to the Court only with requests for advisory opinions. 57/

149. These objections could probably be overcome by having recourse to the "binding advisory jurisdiction" of the Court. 58/ However, while the possibility of entrusting revision proceedings to the Court does not seem far-fetched, such a step would undoubtedly give rise to fairly difficult technical problems concerning, in particular, the initiation of the proceedings and the choice of organ called upon to formulate the application for an opinion.

150. Consequently, it would probably be better to envisage the establishment of a special court for the revision of judgements of the Tribunal (Court of Revision), which could be composed of:

(a) The President or Vice-President of the International Court of Justice;

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55/ Art. 92 of the United Nations Charter.

56/ Art. 36 of the Statute of ICJ.

57/ Art. 96 of the Charter and Art. 65 of the Statute.

58/ ICJ has always acknowledged that "the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with" (cf. ICJ advisory opinion of 23 October 1956, Judgments of the Administrative Tribunal of ILO upon Complaints Made against UNESCO, Reports, 1956, p. 84).

(b) The President of the European Court of Human Rights;

(c) The President of the Inter-American Court of Human Rights; and

(d) The President of the African Commission on Human and Peoples' Rights;

or their representatives, selected from among those organs, which the Committee considers should play a prominent role in the procedure for nominating the members of the Tribunal (see part V, sect. B, below).

151. In order to avoid improper applications, it would be appropriate either to institute a screening process - which might render the machinery cumbersome - or, which is undoubtedly preferable, to empower the Court of Revision to reject applications for revision, whether made by the convicted person or by the Commission for Investigation and Prosecution, if they are clearly without substance, by following a summary procedure.

152. The supervision exercised by the Court of Revision should apply only to points of law, to the exclusion of all questions of fact. 59/

153. Unlike ICJ, a Court of Revision could hand down a decision which would be binding on the Tribunal. If the Court criticized the legal reasoning followed by the Tribunal, it would be left to another chamber to award a new judgement that would conform to the decision of the Court.

## G. Execution of sentences

154. Once the judgement has become final, the question arises as to the means of execution of the term of rigorous imprisonment (see part IV, sect. B, above) that might eventually be imposed.

155. In this respect, there is a choice between international execution - along the lines of the solution adopted following the Nürnberg trials - or execution through the intermediary of a State - as provided for in article 40 of the League of Nations Convention for the Creation of an International Criminal Court of 16 November 1937. The precedent - which is not very persuasive in this respect - based on the unique experience of international execution, with its high cost and the considerable difficulties of

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59/ This could be based on art. 11 of the Statute of the United Nations Administrative Tribunal, under which judgements rendered by that body may be contested by means of a "binding advisory opinion", "on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice".

implementation, leads the Committee to declare itself clearly in favour of handing over the convicted person to a State, designated by the Tribunal, for the sentence to be served under the conditions laid down by the national law of that State.

156. It goes without saying that:

(a) The State entrusted with execution of the sentence must already have accepted that responsibility (the list of countries that "volunteer" could be prepared by the Security Council or by the Tribunal);

(b) The law of that State must respect in all points the rights guaranteed to persons deprived of liberty; 60/

(c) A mechanism must be devised in order to enable the costs entailed by the deprivation of liberty to be borne at the international level. 61/

## H. Pardon and remission of sentence

157. Even though the death sentence could not be pronounced (see part IV, sect. B, above), there are obvious considerations, both human and political, that seem to require that provision be made for the possibility of a pardon or a remission of the sentence. That possibility, which was ruled out neither by the Charter of the Nürnberg Tribunal 62/ nor by that of the Tokyo Tribunal, 63/ is, moreover, envisaged by most of the proposals for creating an international criminal court.

158. In specific terms, a pardon could be granted either by the Tribunal itself - but that would confuse the functions somewhat and might cause the existence of that body to be unduly prolonged - or by the Security Council, or by the State entrusted with execution. The last two solutions both have their merits: the State of execution is "closer to the convicted person" and is aware of the real personal situation of that individual (illness, remorse); while the Security Council is in a better position to take into account the political risks and advantages of a grant of pardon or a remission of the sentence.

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60/ Cf. art. 10 of the 1966 Covenant on Civil and Political Rights.

61/ The costs to be borne by the United Nations budget or by a fund based on voluntary contributions. The execution of sentences does not necessarily have to be financed in the same way as the functioning of the Tribunal (see part V, sect. I, below).

62/ Art. 29.

63/ Art. 17.

159. In the view of the Committee, there is a satisfactory means of combining these two procedures by deciding that the State entrusted with execution of the sentence may pardon the convicted person or reduce the sentence if the Security Council does not object within a specific period following notification by the authorities of that State of their intention.

## V. INSTITUTIONAL ASPECTS

### A. Composition of the Tribunal - general problems

160. The problem of the composition of the Tribunal covers a number of varied points:

(a) The total number of judges and possible alternates;

(b) The qualifications required;

(c) The manner of their appointment;

(d) The term of their functions;

(e) The number of members constituting a chamber;

(f) The manner of their appointment;

(g) Possible challenge of their appointment; etc.

161. On all these questions, of very unequal importance, a comparison of the systems adopted under the principal instruments or draft instruments for setting up an international criminal court 64/ indicates considerable uniformity except for the number of judges, which varies considerably from case to case: members representing each type of jurisdiction are elected from among the candidates nominated by the States parties. They must be qualified in criminal law and international law and/or in international criminal law, less often in human rights, and, in accordance with the precedent set by Article 9 of the Statute of ICJ, should represent the main forms of civilization and the principal legal systems of the world.

162. It does not follow, however, that this standard model must or can be copied exactly:

(a) The Tribunal to be set up would be ad hoc, whereas most of the reference models concern proposals for permanent courts;

(b) Except for the Tokyo International Military Tribunal, these bodies were set up (Nürnberg Tribunal) or were to be set up under legal instruments, whereas in the present instance the establishment of such a body by the United Nations Security Council appears to be the most feasible means (see part I, sect. E, above);

(c) It would, moreover, be set up within a specific historical and geographical context, which should be borne in mind.

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64/ See annex III.

163. The Committee considers that there is no "ready-made" or obvious solution in this field. The one it suggests is based on the desire to guarantee that the Tribunal will function effectively while ensuring the legitimacy of the members composing it.

### B. Number of judges - chambers

164. As far as their number is concerned, the overriding consideration should be that the number of judges be as limited as is compatible with their functions.

165. If a chamber is composed of five judges, which would appear to be necessary in order to ensure minimal representation of the main legal systems of the world and a desirable balance between the qualifications of its members (criminal law, international law, human rights), and if it is understood that a chamber having a different composition might re-examine the matter in the case of revision of the judgement (see part IV, sect. F, above), the minimum number of judges is 10. 65/

166. This figure should be augmented by at least one judge competent to rule on applications for release of the accused, and another responsible for enforcing the sentences.

167. Moreover, in order to avoid a complete retrial if a judge becomes incapacitated during the proceedings, it would no doubt be useful to draw on the Charter of the Nürnberg Tribunal, which provided for the presence at the proceedings of alternates capable of replacing the members if the latter were no longer able to perform their functions. 66/

168. It does not seem to be necessary to have as many alternates as members, or even to envisage the special status of alternate judge: it is simpler and probably more equitable for each judge to perform the functions, in turn, of member and alternate in the various chambers.

169. In these circumstances, a total of 15 judges, with the addition of the members of the Commission for Investigation and Prosecution, does not appear to be excessive.

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65/ The need to ensure that the revision proceedings are carried out by a chamber that is different from the one which awarded the first judgement has led the Committee to abandon, with regret, a suggestion that the "major criminals" (see paras. 84-86 above) should be the subject of a judgement by the Tribunal meeting in plenary session.

66/ Cf. Art. 2 of the Charter of the Nürnberg Tribunal.

## C. Appointment and qualifications of judges

170. Several mechanisms may be envisaged with regard to their appointment, but it is essential that they enjoy undisputed legitimacy.

171. This result could be achieved if existing international jurisdictions were entrusted with the task of electing the judges to the Tribunal from among their existing or former members. The International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights could be called upon to constitute the Tribunal; such a procedure would obviously offer the greatest guarantees of impartiality.

172. Apart from possible political resistance on the part of States, which would thereby be deprived of their traditional competence either to nominate or to appoint members of international jurisdictions, such a system could meet with two objections:

(a) On the one hand, existing jurisdictions do not necessarily include in their midst specialists in criminal law;

(b) On the other hand, and more importantly, some of those jurisdictions might find themselves in the awkward position of being under an obligation to nominate certain of their members to the Tribunal; such members would no longer be able to participate in the consideration of cases which they may have had to consider in their original jurisdiction, 67/ which might have to deal with such cases in another context; this could apply in particular to ICJ and the European Court of Human Rights.

173. Such obstacles could be avoided if those jurisdictions were to appoint members of the Tribunal not from among their own members but from among outside persons possessing well-known competence:

(a) In international law;

(b) In criminal law and, particularly, in international criminal law;

(c) In human rights, with the proviso that the composition of the Tribunal should represent a balance among those different qualifications and among the main legal systems of the world.

174. Under such a system, ICJ could be called upon to appoint six judges, while the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights could each appoint three.

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67/ Cf. Art. 17, para. 2, of the Statute of ICJ.

175. If such a procedure were to encounter political difficulties, the Committee is of the view that the Security Council could be called upon to elect the members of the Tribunal from lists of candidates submitted by these four bodies.

### D. Officers of the Tribunal

176. It would rest with the Tribunal thus constituted to elect from among its members a President and a Vice-President, who would be called upon to preside alternately over the chambers formed to try cases, the composition of which would be decided by the Tribunal meeting in plenary session.

### E. Composition of the Commission for Investigation and Prosecution

177. The composition of the investigation and prosecution body is of equal importance to that of the Tribunal itself: it would in fact be invested with absolutely essential functions and would perform a screening role with regard to cases brought to its attention. It is the body which would decide on whether or not to institute proceedings, decide on measures of detention and issue warrants, institute an investigation, decide on the existence of charges and on whether to submit the case to the Tribunal, and present the case for the prosecution (see part III, sects. B to E, above).

178. While some of these tasks are necessarily of an individual nature (for example, the examination and hearing of witnesses, the appointment of experts, the preparation and presentation of the case for the prosecution), many decisions should, in the Committee's view, be taken collectively, bearing in mind both their gravity and the international character both of the crimes being prosecuted and of the Tribunal. This implies that they must be carefully weighed in terms of a wide range of sensibilities.

179. Application of the modified principle of discretionary prosecution put forward by the Committee (see part III, sect. A, above) further accentuates the need to set up a collegiate body composed of nationals of several States which alone would be able, on an acceptable basis, to choose persons to be brought before the Tribunal. That, moreover, was the solution adopted in articles 14 and 15 of the Charter of the Nürnberg Tribunal. 68/

180. The Committee therefore considers that it would be appropriate to establish a Commission for Investigation and Prosecution, the five members of which could be appointed, like the judges of the Tribunal, from among persons

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68/ Similarly, article 33 of the draft statute for an international criminal court drawn up in 1953 by the United Nations entrusted a special chamber with the functions of investigation and committal.

possessing recognized competence in criminal procedure, two of them being appointed by ICJ and one each by the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights, or, failing that, elected by the Security Council from lists of candidates submitted by those bodies.

## F. The Registry

181. The Tribunal and the Commission for Investigation and Prosecution should be assisted in their respective tasks by a Registry with a composition as limited as possible, under a Registrar appointed by the Tribunal.

182. Should the Tribunal be established by a decision of the Security Council, the initial staff of the Registry should, firstly, be placed at the disposal of the Tribunal by the Secretary-General - and augmented subsequently by recruitment conducted by the Registrar under the Tribunal's supervision - and, secondly, should be subject, as appropriate, to the Charter and the Staff Rules of the United Nations or to the Staff Rules of ICJ.

## G. Privileges and immunities

183. Along the lines of that provided for in Articles 19, 32, paragraph 8, and 42, paragraph 3, of the Statute of ICJ, the judges, the members of the Commission for Investigation and Prosecution and the Registrar should enjoy diplomatic privileges and immunities; and the other officials of the Registry, the defence counsel and all other persons called upon to participate in the proceedings (experts, witnesses), should enjoy the privileges and immunities they needed for the performance of their duties.

184. This should not pose any major problems if the Tribunal is established and functions within the framework of the United Nations, since Article 105 of the Charter would apply to all the officials of the Court and the benefits of the Convention on the Privileges and Immunities of the United Nations could, without great difficulty, be extended to persons participating in the proceedings. 69/

## H. Working languages of the Tribunal

185. If the Tribunal is to be established by the Security Council, the working languages should no doubt be the official languages of the United Nations. On the other hand, if it is established by other means, it should be borne in

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69/ See, in this connection, General Assembly resolution 90 (I) of 11 December 1946, which recommends that the benefits of article IV, sects. 11, 12 and 13, of that Convention should be extended to the agents, counsel and advocates appearing before the Court.

mind that the working languages of international jurisdictions have traditionally been French and English. For reasons of economy, limitation to these two languages could, moreover, be proposed: they are also the two sole official languages of ICJ. 70/

186. In all cases, the fundamental principles of respect for the rights of the defence must be observed (see part III, sect. E, above), which implies that the accused should, where necessary, have the assistance of an interpreter during the investigation and the trial, and that all court documents should be translated into his language. 71/

## I. Funding

187. If the Tribunal were to be a subsidiary organ of the Security Council, established under Article 29 of the Charter, it would seem legitimate for such an organ to be financed out of the United Nations regular budget. Admittedly, the regular budget normally covers expenditure relating to the perennial administrative activities of the Organization. In the past, however, other expenses have been charged to that budget, as in the case of the mission of the Secretary-General pursuant to Security Council resolution 309 (1972), relating to Namibia. Even if the Tribunal is not set up formally as a subsidiary organ within the meaning of Article 29, that solution could possibly be adopted.

188. It is true that, during the vote on the budget, the General Assembly could in principle impede the functioning of the Tribunal by refusing to appropriate the necessary funds, or by reducing their amount. However, such an attitude could be considered as not being in conformity with the Charter, bearing in mind the advisory opinion given by ICJ on 13 July 1954: "The function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements." 72/

189. If, however, the Tribunal is established by the Security Council under Chapter VII of the Charter and if its establishment is thus equated with a peace-keeping operation, it would be possible to devise a weighted scale for the apportionment of contributions (in other words, in all probability by

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70/ Cf. Art. 39 of the Statute.

71/ Cf. Art. 14, para. 3 (f), of the 1966 Covenant on Civil and Political Rights.

72/ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Reports 1954.

increasing the assessment of the permanent members of the Council and reducing the normal contribution of the developing countries). The negotiation of such a schedule might well prove to be complicated, however, as shown by the discussions which are continuing at the present time, in view of the considerable number of ongoing peace-keeping operations.

190. A further idea would be to call for voluntary contributions, as in the case of the operations of the United Nations Peace-keeping Force in Cyprus or, in certain respects, as in the case of the Organization's current intervention in Yugoslavia. That solution, too, would be complicated. The Tribunal could not be set up and commence its work until the total financing of its activities was guaranteed for a period judged reasonably necessary for the performance of its functions.

191. That requirement would not dovetail easily with national budgetary rules (annual nature of budgets) and it would not be easy to make a sufficiently precise assessment of the foreseeable costs of the institution. The objection might also be raised that a mechanism for voluntary contributions would not conform with the spirit of the establishment of a Tribunal by the Security Council.

## VI. CONCLUSIONS

192. After as detailed a study as possible, taking into account the extremely short notice given to it, the Committee of Jurists has become convinced that the establishment of an Ad Hoc International Tribunal set up to judge war crimes and crimes against humanity committed in the territory of the former Yugoslavia is possible in law. Without underestimating the problems of a legal and technical nature arising from such a proposal, the Committee considers that they are far from insurmountable and that there are means available to States to take swift action to set up the International Criminal Tribunal - action which the Committee was mandated to consider - if the international community demonstrates a clear political will to that end.

193. The Committee is aware that it does not have the mandate to take a decision on the appropriateness of such a proposal.

194. In conclusion, however, it wishes to emphasize that, in the opinion of all its members, such action would constitute a very important step towards building an international society more concerned about respect for law.

195. In addition to its immediate, law-enforcement function in the strict sense, such a Tribunal could in fact play a not inconsiderable preventive role by deterring the authors of crimes that are being committed daily just a few hundred kilometres from our country from pursuing their deeds, and its creation would, in the long term, constitute an invaluable symbol of the genuine will of the international community to uphold the rule of international law.

Pierre TRUCHE
President

Bernard de BIGAULT du GRANRUT

Paul BOUCHET

Mireille DELMAS-MARTY

Louis JOINET

Claude LOMBOIS

Alain PELLET
Rapporteur

Jean-Pierre PUISSOCHET

ANNEX I

Composition of the Committee

Mr. Pierre Truche, Procurator-General of the Court of Cassation, Chairman

Mr. Bernard de Bigault du Granrut, lawyer at the Paris Bar, former President of the Bar

Mr. Paul Bouchet, Honorary State Counsellor, President of the National Consultative Commission on Human Rights

Madame Mireille Delmas-Marty, Professor at the University of Paris I (Panthéon-Sorbonne)

Mr. Louis Joinet, Advocate-General of the Court of Cassation, Chairman-Rapporteur of the Working Group on Arbitrary Detention (United Nations)

Mr. Claude Lombois, Director of Education, Professor at the University of Paris II (Panthéon-Assas)

Mr. Alain Pellet, Professor at the University of Paris X (Nanterre) and at the Institute of Political Studies of Paris, member of the United Nations International Law Commission, Rapporteur

Mr. Jean-Pierre Puissochet, State Counsel, Director of Legal Affairs at the Ministry of Foreign Affairs

The Committee wishes to express its appreciation to Mr. Terry Olsen, Mr. Michel Raineri and Mrs. François Rouchereau and to the staff of the Division of Legal Affairs of the Ministry of Foreign Affairs who provided secretariat services with great devotion and efficiency.

ANNEX II

Letter dated 16 January 1993 from Mr. Roland Dumas, Minister of State and Minister for Foreign Affairs, to Mr. Pierre Truche, Procurator-General of the Court of Cassation and Chairman of the Committee

Sir,

Unfortunately, there is no longer any doubt that particularly serious crimes are being committed in the territory of the former Yugoslavia that constitute war crimes, crimes against humanity or serious violations of certain international conventions.

Such actions cannot go unpunished, and the absence of real penalties, in addition to being an affront to public conscience, could encourage the perpetrators of these crimes to pursue their regrettable course of action. For that reason, France believes that it is essential to proceed swiftly to the establishment of an International Criminal Tribunal that would be competent to judge these crimes committed in the former Yugoslavia.

France hopes that its establishment may enable the 12 States members of the European Community to give concrete follow-up to the decision that they have just adopted in Paris and that, in addition, this work will permit the speedy establishment of the Tribunal under United Nations auspices.

That is the reason why I have established a Committee of Jurists, composed of a limited number of eminent persons. I should be particularly gratified if you would agree to preside over and guide its work.

I hope that the Committee will be able, on the basis of existing studies and work, to consider precisely and speedily all the various issues raised by the establishment of such a Tribunal and to submit to me a proposal concerning its possible Statute. The Committee will be able to make all the proposals it deems appropriate with regard to the procedure to be followed in establishing the Tribunal and all other points that may be relevant to the end for which the Committee is established. For the purpose of performing its mission, the Committee may, should it deem it necessary, proceed to hear competent individuals.

In view of the urgency of the matter and being aware of the importance of the effort that I am requesting of the members of the Committee, I should be glad if a report on this work could be sent to me by the end of January 1993.

Accept, Sir, the assurances of my highest consideration.

(Signed) Roland DUMAS

ANNEX III

Basic documentation used by the Committee

1. International Law Association (Committee on the Permanent International Penal Court): Draft Statute of the International Penal Court (1926)

2. International Association for Penal Law: Draft Statute for the Creation of a Penal Chamber of the International Court of Justice (1928 - revised in 1946)

3. Convention for the Creation of an International Criminal Court (Geneva, 16 November 1937)

4. London International Assembly (established under the auspices of the League of Nations): Draft Convention for the Creation of an International Criminal Court (London, 1943)

5. United Nations Commission on War Crimes: Draft Convention Establishing a United Nations Tribunal on War Crimes (1944)

6. London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945)

7. Special proclamation of the Supreme Allied Commander at Tokyo: Charter of the International Military Tribunal for the Far East (19 January 1946)

8. Memorandum from the representative of France to the General Assembly Committee to study the progressive development and codification of international law: proposal for the establishment of an International Criminal Court (1947 - A/AC.10/21)

9. Establishment of a Permanent International Criminal Court for the Punishment of Acts of Genocide, Economic and Social Council resolution 77 (V), annex I

10. Establishment of an Ad Hoc International Criminal Court for the Punishment of Acts of Genocide, ibid., annex II

11. French delegation to the Sixth Committee of the United Nations: Draft Convention on Genocide (containing provisions relating to an International Criminal Court) (1948 - A/C.6/211)

12. United Nations Committee on International Criminal Jurisdiction: revised draft statute for an International Criminal Court (1953)

13. Foundation for the Establishment of an International Criminal Court and International Criminal Law Commission: Draft statute for an International Criminal Court (Bellagio and Wingspread, 1972)

14. United Nations Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes (1981)

15. International Law Association: Draft statute for an International Criminal Court and draft Protocol I concerning applicable penalties (Paris, 1984)

16. Ibid.: Draft Protocol II concerning exonerating causes and draft Protocol III concerning forms of commission of infractions (preparatory acts, attempts, perpetration, incitement, assistance, conspiracy, etc.) (1988)

17. Committee of Experts on International Criminal Policy for the Prevention and Control of Transnational and International Crime and for the Establishment of an International Criminal Court: Draft Convention Establishing an International Criminal Court (Havana, 1990)

18. Center for United Nations Reform Education, B. F. MacPherson: Draft statute for an International Criminal Court (1992)

19. International Association for Penal Law, Mr. Cherif Bassiouni: Draft Statute of the International Criminal Tribunal (1992)

ANNEX IV

Principal recommendations of the Committee - applicable principles

The Committee considers that the establishment of a Tribunal for the trial of the crimes against humanity and war crimes committed in the territory of the former Yugoslavia is legally possible and may be effected speedily if States have the political will to do so.

In the view of the Committee, the following principles should be applied:

Nature of the Tribunal

1. The Criminal Tribunal for the former Yugoslavia should be an ad hoc jurisdiction established on a universal basis (introduction, paras. 1-6; part I, sects. A and B; annex V, art. I, para. 1).

Establishment of the Tribunal

2. The establishment of a Tribunal by means of a treaty would take considerable time and would raise more legal problems than it would resolve (part I, sect. C).

3. The most appropriate mode of establishment would be by a resolution of the United Nations Security Council, acting under Chapter VII of the Charter with a view to the restoration and maintenance of international peace and security (part I, sects. D to G).

4. Failing that, "mixed" solutions might also be envisaged combining the intervention of the Security Council and that of certain States, either by the countries which have come into existence as a result of the dissolution of the former Yugoslavia being invited by the Council to take certain initiatives with the view to the trial of the criminals or by the Council entrusting the task of constituting an International Tribunal to a group of States (part I, sect. H).

Term of existence of the Tribunal

5. The Tribunal might be dissolved by the Security Council when the Council considered its existence to be no longer necessary to the restoration and maintenance of international peace and security (part I, sect. F; annex V, art. I, para. 2, and art. II, para. 2).

Composition of the Tribunal

6. The Tribunal might be composed of 15 Judges presenting guarantees of extensive competence in international law, criminal law and, in particular, international criminal law and human rights. Its composition should be

balanced both as regards the areas of competence of the Judges and at the geographical levels (part V, sects. A to C; annex V, art. II, para. 1).

7. The mode of appointment of the Judges should guarantee their legitimacy. It might be guaranteed by their appointment by the International Court of Justice, the European and the Inter-American Courts of Human Rights and the African Commission on Human and Peoples' Rights or by the establishment by them of a list of candidates from which the Security Council would elect the Judges (part V, sect. C; annex V, art. II, para. 1).

8. The Tribunal will establish its bureau (part V, sect. D; annex V, art. II, para. 3).

Competence of the Tribunal

9. Ratione materiae, the Tribunal should be competent to try cases involving grave breaches of the Geneva Conventions of 1949 - a list of which should be reproduced in the text of the Statute - where they present a systematic and mass character, and crimes against humanity committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such (part II, sects. A to E; annex V, art. VI).

10. The Committee emphasizes that the above-mentioned crimes already constitute international crimes according to existing customary and conventional rules of international law and general principles of law recognized by all nations. Conviction of the perpetrators thereof by an international court does not have retroactive effect and could in no way violate the principle of nullum crimen sine lege. The establishment of the Tribunal would, on the contrary, make it possible to guarantee impartial justice without any spirit of revenge (part I, sect. A, and part II, sects. B and C).

11. Ratione loci, the competence of the Tribunal should extend to crimes defined as such committed anywhere in the territory of the former Yugoslavia (part II, sect. F; annex V, art. I, para. 1).

12. Ratione temporis, the competence of the Tribunal should be restricted to the period beginning on 25 June 1991, which marks the beginning of the process of the dissolution of the former Yugoslavia (part II, sect. G; annex V, art. I, para. 1).

13. Ratione personae, political decision-makers, those giving orders and those executing them and individuals participating in a group constituted with a view to committing the crimes coming within the competence of the Tribunal may be prosecuted. Neither the official capacity of the perpetrators of those crimes nor the orders received will relieve the individuals in question of criminal responsibility (part II, sects. H to J; annex V, art. VII).

Investigation and prosecution

14. Investigation and prosecution should be entrusted to a Commission that will take the most serious decisions on the matter on a collegial basis (part III, sect. A, and part V, sect. E; annex V, art. III).

15. The Commission for Investigation and Prosecution might be composed of five members appointed in the same way as the Judges of the Tribunal and selected from among persons competent with regard to criminal proceedings (part V, sect. E; annex V, art. III).

16. The Committee declares itself in favour of the principle of discretionary prosecution, provided that the decisions taken respect the principle of equality before the law, are taken on a collegial basis and are well-founded (part III, sects. A, B and E and part IV, sect. C; annex V, art. IX, para. 4, and art. XI, para. 2).

17. The Commission for Investigation and Prosecution might be seized ex officio or be seized by one of the bodies already established within the United Nations to gather information on war crimes and crimes against humanity committed in the territory of the former Yugoslavia ("Mazowiecki Commission" and "Kalshoven Commission") and also by humanitarian organizations to be listed by the Security Council. No civil actions shall be admitted (part III, sects. A and B; annex V, art. XI, para. 1).

18. The Commission for Investigation and Prosecution will conduct the investigation in accordance with the general principles of law in the matter and with full respect for the rights of the defence (part III, sects. B and F; annex V, art. XII).

19. States, both parties to the conflicts that divide the former Yugoslavia and others, should be required to cooperate fully with the Commission and, in particular, to deliver the prosecuted persons to the Tribunal. In the view of the Committee, the existing traditional rules on the question of extradition would not oppose such delivery (part III, sects. B and C; annex V, art. XIII).

20. Once the investigation is terminated, the Commission may, by a collegial and well-founded decision, either decide that there no grounds for prosecution or commit the defendant to the Tribunal or to a national court, if there are certain charges against him that do not, however, appear to constitute crimes within the meaning of the Statute of the Tribunal (part III, sect. F; annex V, art. XIV).

Proceedings before the Tribunal

21. Proceedings before the Tribunal must scrupulously respect the fundamental principles of criminal procedure recognized by all nations and, in particular, the rights of the defence (part III, sects. E to G; annex V, art. XV).

22. The proceedings may take place before a Chamber composed of five Judges and two surrogate Judges (part V, sect. B; annex V, art. II, para. 4, and art. XV, para. 1).

Sentencing and penalties

23. Judgements shall be adopted by a majority of the members of the Chamber and shall state the grounds on which they are based (part IV, sect. A; annex V, art. XVI, para. 1).

24. The Tribunal may either release the defendant, or relinquish jurisdiction in favour of a national court (with a view, principally, to contributing to the re-establishment of the normal functioning of the judicial authority in the States arising out of the dissolution of the former Yugoslavia), or convict the defendant (part IV, sects. A and C; annex V, art. VIII, para. 1, and art. IX, para. 4).

25. A defendant found guilty may be sentenced to rigorous criminal imprisonment, the duration of which shall be determined on the basis of the principles of proportionality and individualization (part IV, sect. B; annex V, art. VIII, para. 2).

26. Machinery should be envisaged for settling the problems that might arise from the concurrence of national and international jurisdictions in favour of the latter (part IV, sect. C; annex V, art. IX, paras. 1 to 3).

27. Sentences may be served in the territory of a State which has been designated for that purpose by the Tribunal and which has agreed to discharge such commission in cooperation with the Judge enforcing the sentence (part IV, sect. G; annex V, art. XIX, para. 1).

28. The State entrusted with the execution of sentence should be able, under the supervision of the Security Council, to pardon the convicted person or to mitigate the sentence (part V, sect. A; annex V, art. XIX, para. 2).

Judicial remedies

29. While an appeal against judgements appears to be ruled out, a revision procedure based exclusively on points of law should nevertheless be envisaged (part IV, sects. D and F; annex V, art. XVIII).

30. If new facts come to light, the convicted person or the Commission for Investigation and Prosecution should apply for review of the judgement (part IV, sect. E; annex V, art. XVII).

## ANNEX V

### Possible provisions for the Statute of the Tribunal

Several reasons prompted the Committee not to prepare a draft Statute, in the strict sense of the term, for the International Tribunal to try the crimes against humanity and the war crimes committed in the former Yugoslavia. In the first place, the exact wording of the articles depends on very diverse considerations, some of which, particularly the means of its establishment, are unknown to the Committee. In the second place, whatever method is selected, it seemed to the Committee that this Statute must be worked out in an international forum and that any proposal which France might make would necessarily be modified and probably enriched through confrontation with the ideas on the same subject produced in parallel by other bodies. Lastly, in the brief period allotted to it, the Committee would not in any event have had the time to work out the provisions of such a Statute in every detail.

The present annex therefore must be regarded as but one example, incomplete and capable of improvement, of possible provisions for the Statute of the Tribunal.

In drawing up these provisions, the Committee assumed that the Tribunal would be established by a resolution of the United Nations Security Council in the context of the powers conferred on the Council under Chapter VII of the Charter with a view to the maintenance of international peace and security. It wishes to repeat, however, that other assumptions are possible.

ARTICLE I

Establishment of the Tribunal

1. There is hereby established an International Tribunal for the trial of persons responsible for the crimes referred to in article VI which are committed in the territory of the former Yugoslavia subsequent to 25 June 1991.

2. The Security Council shall terminate the existence of the Tribunal when it considers that the Tribunal is no longer necessary to the restoration and maintenance of peace.

ARTICLE II

Composition and organization of the Tribunal

1. The Tribunal shall be composed of a body of independent judges appointed from among persons of recognized competence in

international law,

criminal law, especially international criminal law,

human rights.

The 15 Judges who make up the Tribunal shall be appointed [by the Security Council] as follows

Six [from a list of 18 names drawn up] by the International Court of Justice, and

Three [from lists of 9 names drawn up] respectively by the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights.

[The Security Council] [The nominating authorities] shall bear in mind not only that the persons to be appointed to the Tribunal should individually possess the qualifications required, but also that in the body as a whole the representation of the principal legal systems of the world should be assured and that the qualifications of the candidates should be sufficiently diversified and balanced.

No two members of the Tribunal may be nationals of the same State.

2. Should the Tribunal be required to continue its work beyond 31 December [1998], the Security Council shall take the necessary measures to ensure the renewal by rotation of the Judges and of the Commission for Investigation and Prosecution.

3. The Tribunal shall elect from among its members a President and a Vice-President, together with a Judge to hear appeals from decisions to place a person in custody taken by the Commission for Investigation and Prosecution and a Judge responsible for the enforcement of sentences.

4. The composition of the Chambers of five Judges which try the cases or which issue the final decisions following proceedings for revision shall be determined by the plenary Tribunal.

Either the President or the Vice-President of the Tribunal shall preside over the Chambers; in addition two alternate members shall be selected from among the Judges who follow the entire proceedings for the purpose of replacing a full member who is absent.

No judge may participate in the adoption of a judgement if he has been required previously to take cognizance of the facts of the case in any way that might give rise to doubt as to his impartiality.

## ARTICLE III

### Commission for Investigation and Prosecution

The Commission for Investigation and Prosecution shall be an independent body whose members shall be appointed from among persons with the necessary qualifications in criminal procedure.

The five members who make up the Commission shall be appointed [by the Security Council] as follows:

Two [from a list of six names drawn up] by the International Court of Justice, and

One [from lists of three names drawn up] respectively by the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights.

No two members of the Commission may be nationals of the same State.

## ARTICLE IV

### The Registry

The Tribunal and the Commission for Investigation and Prosecution shall be assisted in their respective work by a Registry, which shall be headed by a Registrar appointed by the Tribunal.

The Regulations [and Rules of the staff of the United Nations] [of the staff of the International Court of Justice] shall apply *mutatis mutandis* to the staff of the Registry.

ARTICLE V

Privileges and immunities

The members of the Tribunal, the members of the Commission for Investigation and Prosecution and the Registrar shall enjoy diplomatic privileges and immunities in the exercise of their duties.

The counsel of the defendants, the experts and the witnesses shall enjoy such privileges and immunities as are required for the independent exercise of their duties and for their participation in the activities of the Tribunal.

ARTICLE VI

Definition of the crimes within the jurisdiction of the Tribunal

1. The Tribunal shall be competent to try persons who are suspected of committing one or more of the following crimes:

(a) Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children of the group to another group;

(b) And, when they are mass and systematic, any of the following acts:

(i) Violence to life and person, in particular murder of all kinds, and cruel treatment such as torture, mutilation or any kind of corporal punishment;

(ii) Collective punishment;

(iii) Taking of hostages;

(iv) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution and indecent assault;

(v) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, and affording all the judicial guarantees which are recognized as indispensable by all nations;

(vi) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(vii) Plunder.

2. The characterization of an act or omission as an international crime within the jurisdiction of the Tribunal is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

## ARTICLE VII

### Persons responsible

1. The crimes referred to in article VI shall be deemed to have been committed by any individual who:

(a) Participated in drawing up a common plan to commit the crime or have it committed, was associated in some way with its implementation or its transmission to persons called upon to execute it or gave general or specific instructions for its execution, even in part;

(b) Gave orders for the commission of one or more of the said crimes;

(c) Committed, tried to commit, knowingly helped to commit or knowingly allowed to be committed even though he could have prevented one or more of the said crimes.

2. The crimes referred to in article VI shall be deemed to have been committed by any individual who was a member of an organization or a de facto group, at any level whatsoever, having as its objective, even secondary, the commission of one or more of the said crimes.

Any individual who, of his own accord and prior to any proceedings, ceased to belong to the organization or the group and since that time has consistently refrained from participating in its activities shall be absolved of responsibility for the offence provided for in the present paragraph.

Prior to any formal conviction on this ground, the Tribunal shall determine by a separate decision the criminal character of an organization or a group.

3. The fact that the perpetrator of a crime acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

4. The official position of the perpetrator of a crime does not relieve him of responsibility in criminal matters.

## ARTICLE VIII

### Penalties

1. A defendant found guilty of one or more of the crimes referred to in article VI shall be sentenced to rigorous imprisonment.

2. The length of the penalty shall be determined by applying the principles of proportionality and individualization. In setting the length of the penalty, the Tribunal shall take account of the favourable or unfavourable circumstances that determined its decision, which shall spell out the reasons on which it is based.

## ARTICLE IX

### Non bis in idem; concurrence of jurisdictions

1. The jurisdiction of any national criminal court under internal law shall not prejudice the jurisdiction of the Tribunal.

2. No proceedings can be instituted or continued before a national court for any act, even if characterized differently, which has been irrevocably pronounced on by the Tribunal once the defendant substantiates, in the event of sentencing by the Tribunal, that the penalty has been carried out or is being carried out.

3. Any sentence by the Tribunal shall annul a national judgement handed down with respect to the same acts, even if characterized differently, since a convicted person cannot evade the execution of a penalty.

The sentence handed down by a national court for a number of offences only some of which have been penalized by the Tribunal shall be absorbed by the penalty imposed by the Tribunal if such penalty is heavier.

If the penalty imposed by the Tribunal is lighter than the sentence handed down by the national court, the two shall be merged if they are of the same nature. If this is not the case, they shall be cumulative, the penalty imposed by the Tribunal always being carried out first.

4. The Tribunal may, of its own accord or at the request of the Commission for Investigation and Prosecution, relinquish jurisdiction in favour of a criminal court of the State in whose territory the crime was committed or of which the perpetrator or the victim is a national, if it considers that the conditions for independent and impartial justice are present.

The decision by which the Tribunal relinquishes jurisdiction shall state the reasons on which it is based. The records of the case shall then be transmitted to the competent national court.

ARTICLE X

Rights of the defence

1. The accused shall be presumed innocent until proved guilty by the Tribunal.

2. The accused must be tried impartially; in particular, he has:

(a) The right to a fair and public hearing;

(b) The right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) The right to legal assistance of his own choosing in the preliminary examination and to be informed, if he does not have legal assistance, of this right; the right to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(d) The right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(e) The right to be tried without undue delay;

(f) The right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

(g) The right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) The right to have the free assistance of an interpreter if he cannot understand or speak the language used in the preliminary examination or the hearing;

(i) The right not to be compelled to testify against himself or to confess guilt.

ARTICLE XI

Referral to the Commission for Investigation and Prosecution

1. The Commission for Investigation and Prosecution may be seized ex officio.

2. The Special Rapporteur appointed pursuant to resolution 1992/S-1/1, of 14 August 1992, of the United Nations Commission on Human Rights and the impartial Commission of Experts constituted pursuant to resolution 780 (1992) of the Security Council shall refer to the Commission for Investigation and Prosecution information known to them about acts which might constitute the crimes referred to in article VI of the present Statute.

The humanitarian organizations listed in an annex to the present Statute may also refer information about such acts to the Commission.

3. The Commission for Investigation and Prosecution shall decide, by a decision of the majority of its members, whether or not to institute proceedings.

ARTICLE XII

Investigation

1. The Commission for Investigation and Prosecution shall have all the necessary powers to confirm the evidence already gathered and to seek further evidence, both for and against the accused.

2. These powers and the investigation proceedings shall be laid down in the Rules of the Tribunal.

ARTICLE XIII

Judicial cooperation; handing over of the accused; placing the accused in custody

1. Every State shall be required to extend to the Commission for Investigation and Prosecution the assistance of its judicial bodies and police in the investigational measures decided on by the Commission and to facilitate, by every means available, the process of tracking down, arresting and transferring any person accused of one of the crimes referred to in article VI so that he can appear before the Tribunal.

2. The Commission for Investigation and Prosecution may decide to place in custody a person accused of such a crime if the circumstances of the investigation so require or if there is a real danger that the accused may evade justice.

The accused may institute an appeal against any detention measure before one of the judges of the Tribunal designated for this purpose.

ARTICLE XIV

Referral to the Tribunal

When it considers that the investigation is terminated, the Commission for Investigation and Prosecution shall, by a decision of the majority of its members which is public and states the reasons on which it is based,

(a) Either decide that the charges are insufficient and that there are no grounds for prosecution;

(b) Or transfer the accused to an independent and impartial national court if the offences, although characterized, do not conform to the definition of the crimes that are within the jurisdiction of the Tribunal according to article VI of the present Statute; the competent national court shall, in such instance, be seized of the matter and shall try the accused;

(c) Or refer to the Tribunal an indictment describing the facts and detailing the counts.

ARTICLE XV

Proceedings

1. The proceedings shall be held in public before a Chamber of the Tribunal.

The Chamber may order the court to be cleared and closed during all or part of the trial in the interests of law and order or where the interests of privacy or the safety of the victim, the defendant or the witnesses so require, or to the extent that it deems that the special circumstances of the case so require.

2. A defendant may be subject to a contumacious judgement.

3. The Rules of the Tribunal, to be adopted by it and by the Commission for Investigation and Prosecution sitting in full session, shall establish the details of the proceedings on the basis of respect for basic human rights, the general principles of the law of criminal procedure which are recognized by all nations, and the provisions of this Statute.

ARTICLE XVI

Consideration and judgement

1. Judgements shall be adopted by a majority vote of the Judges who are members of the Chamber. Judgements shall state the grounds on which they are based and shall not include the individual or dissenting opinions of the Judges. They shall be read out at a public hearing.

2. Judgements shall be enforceable.

ARTICLE XVII

Review

If one or more new facts come to light which are likely to have a decisive influence on the judgement and of which the Tribunal was unaware at the time that judgement was rendered, the Commission for Investigation and Prosecution or the convicted person may submit to the Tribunal an application for review of the judgement.

ARTICLE XVIII

Revision

1. There shall be established a Court of Revision of Judgements of the Tribunal, consisting of the President and Vice-President of the International Court of Justice and the Presidents of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights, or their representatives designated from within these bodies.

An application may be submitted to the Court of Revision by the Commission for Investigation and Prosecution or the convicted person, claiming that the Tribunal, in rendering its judgement, has exceeded its competence or has failed to exercise competence vested in it, or has erred on a question of law, thus vitiating the judgement, or has committed a fundamental error in procedure which has occasioned a failure of justice.

2. The Court of Revision shall, following a summary procedure, reject applications which are clearly unfounded.

3. Should the Court of Revision decide that the judgement has been vitiated by one of the flaws enumerated in the preceding paragraph, a Chamber of the Tribunal, being composed of members other than those who rendered the initial judgement, shall render a new judgement pursuant to the Court's decision.

ARTICLE XIX

Execution of sentences; pardon

1. Sentences shall be served in a State designated by the Tribunal on the basis of a list drawn up by the Security Council of States Members of the United Nations which have expressed their willingness to accept convicted persons. Imprisonment shall be subject to the national rules of the State in which the sentence is executed and shall be imposed under the supervision of the Judge appointed by the Tribunal from among its members to enforce the sentences.

2. If it deems that circumstances so require, the State in which the sentence is executed may submit to the Security Council a report stating the grounds for the pardon or the measure mitigating the sentence pronounced which it proposes to implement. The opinion of the Judge overseeing the execution of sentences shall be annexed to this report.

If the Security Council does not object to such a measure within a period of one month, the State in which the sentence is executed shall grant the pardon or mitigate the sentence as envisaged in its report.

ARTICLE XX

Languages

[To be inserted]

ARTICLE XXI

Funding; seat

[To be inserted]

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